(52)

A.F.R.

HIGH COURT OF CHHATTISGARH AT BILASPUR

Cr. Appeal No.953/2001

Sudhari alias Shivdhari Singh

Vs.

The State of Chhattisgarh

Post for Orders : 31 .07.2006

Sd/-
Dilip Raosaheb Deshmukh
Judge

(53)

A.F.R.

HIGH C.OURT OF CHHATTISGARH AT BILASPUR

Cr.Appeal No.953/2001

Before : Hon'ble Shri Dilip Raosaheb Deshmukh, J.

Sudhari alias Shivadhari Singh

Vs.

The State of Chhattisgarh

Present:-

Shri Neeraj Mehta, learned Counsel for the appellant.
Shri M.P.S.Bhatia, Panel Lawyer for the State.

JUDGMENT
(Delivered on 31.07.2006)

This appeal is directed against the judgment dated 23.8.2001 delivered in Sessions Case No.212/2001 by Shri T.P.Sharma, 1st Additional Sessions Judge, Koriya (Baikunthpur) whereby the appellant was convicted under Section 450 and 376 I.P.C. and was sentenced to rigorous imprisonment for seven years under Section 376 I.P.C. and to rigorous imprisonment for three years under Section 450 I.P.C.

2. Briefly stated the prosecution story is that on 18.3.2001, the prosecutrix aged about 16 years was alone at her residence in village Khod, Badkapara, P.S. Patna, District Koriya. Her parents i.e. Ramadhar P.W.2 and Moharmunia P.W.6 had gone to another village. It is alleged that at about 8.00 P.M. the appellant entered the house of the prosecutrix and threatening to kill her, if she shouted, pushed her on a cot and committed rape on her twice. At about 9.00 P.M., the parents of the prosecutrix returned home. Seeing them, the appellant ran away. The prosecutrix narrated the incident to her parents.

F.I.R. was lodged vide Ex.P.1 on 19.3.2001 at 3.45 P.M. by prosecutrix. The school certificate showing the date of birth of the prosecutrix as 8.7.1985 Ex.P.4 was seized from the prosecutrix vide Ex.P.3. Dr. Kalawati Patel P.W.8 examined the prosecutrix on 19.3.2001 and found no external injury anywhere on her body. Upon internal examination, she found that the hymen had an old rupture, vagina easily admitted two fingers and the prosecutrix was menstruating. It was opined that the prosecutrix was accustomed to sexual intercourse and there was no evidence of rape having been committed on her. The vaginal slides were prepared and handed over to the Constable which was seized vide Ex.P.9. The *Chaddi* of the prosecutrix was seized vide Ex.P.2 on 23.3.2001. The underwear worn by the appellant was also seized vide Ex.P.14 on 21.3.2001. On being sent for chemical analysis, the F.S.L. vide report Ex.P.17 confirmed that semen or human spermatozoa was not present either on the vaginal slides or on the *Chaddi* of the prosecutrix. However, presence of semen and human spermatozoa was confirmed on the underwear of the appellant. However, these stains were not sufficient for Serological examination. After completion of investigation, the appellant was prosecuted under Section 450 & 376 I.P.C.

3. The appellant abjured the guilt, pleaded innocence and led no evidence in defence. The prosecution examined as many as 8 witnesses. Relying upon the evidence led by the prosecution, the learned trial Judge convicted and sentenced the appellant as mentioned in paragraph-1.

4. Shri Neeraj Mehta, learned counsel for the appellant has assailed the conviction of the appellant on the ground that the evidence led by the prosecution clearly establishes that the

prosecutrix was aged more than 16 years on the date of occurrence and the possibility that the alleged sexual act, if any, committed by the appellant was wholly with the consent of the prosecutrix could not be ruled out. It was also contended that the prosecutrix had lodged a similar report of rape against the appellant on an earlier occasion in which case also the appellant had been acquitted. Lastly, it was urged that the appellant had been falsely implicated upon a property dispute. On the other hand, Shri M.P.S.Bhatia, learned Panel Lawyer argued in support of the impugned judgment.

5. Having considered the rival submissions, I have perused the record. So far as the age of the prosecutrix is concerned, she admitted in para 12 of her testimony that she was aged about 17 years on the date of her evidence on 25.7.2001. Ramadhar P.W.2, father of the prosecutrix also admitted that he did not remember the date of birth of the prosecutrix. Moharmunia P.W.6 also admitted in cross-examination para 4 that the prosecutrix was aged about 17 years. She also admitted that the documentary proof relating to the date of birth of the prosecutrix was available at her home but was not given to the police. Ramadhar P.W.2 also admitted that birth of the prosecutrix had been reported to the Kotwar. The prosecution has not produced the primary evidence i.e. the Kotwari Register to prove date of birth of the prosecutrix. Dr. Kalawati Patel, P.W.8 also opined that the prosecutrix was aged about 16 years and she had referred her to the C.M.O. for confirmation of age. During investigation, Radiological examination of the prosecutrix for confirmation of her age was also not done. In the above mentioned circumstances, the possibility that the prosecutrix was aged 16 years or more on the date of occurrence could not be ruled out.

6. The prosecutrix P.W.1 stated that while she was alone in the house, the appellant entered the house and held her hand and threatened to kill her, if she shouted. After this, the appellant removed her salwar and *Chaddi* and after removing his clothes made her lie on the cot. Thereafter, the appellant committed sexual intercourse twice with the prosecutrix. At this point of time, parents of the prosecutrix arrived whereupon the appellant ran away.

7. The prosecutrix admitted that houses of Laxman, Jagdish and Dharma Sai are situated near her house and her voice could be heard in the neighbouring houses. She did not testify that she had shouted or raised any alarm during the occurrence although she admitted in cross-examination that the appellant had not gagged her mouth and her hands were also free. Moharmunia P.W.6 also stated in paragraph 3 that any alarm raised from her house could be heard in all the three neighbouring houses. Despite her hands being free and her mouth not gagged, the fact that the prosecutrix did not shout or resist, renders her testimony regarding rape unworthy of credit. She stated that the appellant lifted her in his arms and made her lie on the cot and thereafter removed her clothes. Since nothing has emerged in the testimony of the prosecutrix to show that she offered any resistance or raised any alarm during the alleged sexual act, the possibility that sexual intercourse, if any, had been committed with the consent of the prosecutrix could not be ruled out. The contents of F.I.R. Ex.P.1 also lend support to the aforesaid inference since it shows that the appellant had sexual intercourse with the prosecutrix for about one hour inside her house and ran away on seeing her parents arrive.

8. Ramadhar P.W.2 and the prosecutrix P.W.1 have admitted in their testimony that on an earlier occasion also the prosecutrix had

lodged the report of rape against the appellant in which case the appellant was acquitted. The prosecutrix has also admitted in para 5 that parents of the appellant were forcing her to marry the appellant. Ramadhar P.W.2 stated in para 6 that had he liked the appellant, he would not have lodged a report against him.

9. The testimony of the prosecutrix that the appellant forcibly raped her twice till arrival of her parents is rendered unworthy of credit since medical evidence of Dr. Kalawati Patel P.W.8 also does not corroborate the testimony. Dr. Kalawati P.W.8, upon examination of the prosecutrix on 19.3.2001 did not find any external injury on the prosecutrix and found an old rupture in the hymen. She also found that the prosecutrix was menstruating. This fact also renders the testimony of the prosecutrix unworthy of credence. If despite the fact that the prosecutrix was menstruating, the appellant had committed rape twice on her for one hour, undergarment of the prosecutrix as also of the appellant would have had blood stains. No such finding was recorded by F.S.L. in its report Ex.P. 17 which clearly goes to show that presence of semen or human spermatozoa on the vaginal slides of the prosecutrix was also not confirmed which also contradicts the testimony of the prosecutrix and renders her unworthy of any credit.

10. The prosecutrix in para 4, Ramadhar P.W.2 in para 7 and Moharmunia P.W.6 in para 3 have admitted that relationship with the appellant's family was strained due to an old property dispute and they were not on visiting terms. If such was the position and if on an earlier occasion the appellant had been acquitted in an earlier case of rape, it does not seem possible that the appellant would have gone to the house of the prosecutrix to commit rape on her. The possibility

that at the behest of her parents the prosecutrix lodged a false report against the appellant cannot be ruled out.

11. The following facts thus emerge from the above discussions.

A) It could not be ruled out that the age of the prosecutrix was 16 years or more on the date of occurrence.

B) It also could not be ruled out that the appellant was falsely implicated.

C) The testimony of the prosecutrix about rape on her was wholly unworthy of any credit in view of her conduct during the sexual act, if any, the fact that she was menstruating and also since it was not corroborated by medical evidence or by the report of F.S.L.

D) The possibility that sexual intercourse, if any, had been committed with the consent of the prosecutrix could also not be ruled out.

12. Having thus considered the evidence led by the prosecution in its entirety and the above facts emerging therefrom, I am of the considered opinion that conviction of the appellant under Section 450 and 376 I.P.C. and the sentence awarded thereunder are liable to be set aside and the appellant is entitled to benefit of doubt.

13. In the result, the appeal is allowed. Conviction of the appellant under Section 450 and 376 I.P.C. and the sentence awarded thereunder are set aside and the appellant is acquitted after giving him benefit of doubt. The appellant shall be set at liberty forthwith, if not required in any other case.

Sdl-
Dilip Raosaheb Deshmukh
Judge

Anjani
Tumane